No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
Appellant,

vs.

CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The plaintiff, Catherine Brady, was married to Charles Brady in Anchorage, Alaska in November of 1949 (TR 15). Charles Brady had previously been married to and divorced from the defendant Myrtle Hollman's daughter (TR 33). Although Charles Brady's relationship with the defendant, formerly his mother-in-law, was friendly prior to his marriage to plaintiff, that relationship became less friendly and the parties "grew apart" after this marriage (TR 34-37). At the time of plaintiff's marriage, Charles Brady was a partner in the Red Cab Company of Anchorage (TR 16). As of November 24, 1951, plaintiff was employed as a dispatcher by the Red Cab

Company, dispatching on the same shift on which her husband drove one of his cabs. Each of the three partners owned their own cabs and arranged for their own dispatchers on the shifts that they operated (TR 45-47). Each partner kept the profits accuring from the operation of his cabs and they did not account to each other as to profits. The defendant was one of the partners. Plaintiff, in acting as a dispatcher, was the employee of her husband, Charles Brady and not responsible to either of the other two partners (TR 84-85).

On November 24, 1951, the three partners, Charles Brady, the defendant and Sam Mealey, met at the defendant's home to discuss incorporating their business (TR 16). During this discussion, and while angry at Charles Brady, the defendant stated to Charles Brady, "You are not so smart, you have got an ex-whore for a wife", and further stated to Charles Brady that his wife, the plaintiff, had worked with a girl named June in Butte, Montana (TR 19).

The above statement was made in the presence of Sam Mealey. Plaintiff and Charles Brady had been married happily for approximately two years prior to the defendant's statement (TR 31 and TR 63). Charles Brady's habits with respect to drinking intoxicating liquor were fairly moderate prior to November 24, 1951 and during his marriage to plaintiff (TR 63), but after defendant's statement, he often brooded over the remarks and frequently drank to excess and abused plaintiff because of his doubts as to the truth of the statements (TR 41), but arguments

over the defendant's statement were not always the result of drinking (TR 54).

Prior to November 24, 1951, plaintiff was in a healthy condition and weighed 135 pounds. As a result of the attitude of her husband after defendant's remarks and the frequent arguments and abuse, plaintiff became extremely nervous, lost 19 pounds in weight in a period of three months and suffered a heart attack (TR 63-64). As a result of her husband's treatment by reason of defendant's remarks and being no longer able to put up with his attitude and abuse, plaintiff left her husband for a period of over two months but was eventually reunited with him (TR 71). Even after the plaintiff was reunited with her husband, occasional arguments resulted by reason of the statement of defendant and such arguments occurred, though less frequently, even to the date of the trial (TR 71). Plaintiff commenced this suit against her husband's will and without his knowledge (TR 68).

In paragraph 3 of appellant's statement of facts, appellant states as a fact, "The defendant had been informed by a woman known as Marie Cox that the plaintiff had formerly lived in Butte, Montana where at one time, she had been a prostitute, and during the discussion with Brady regarding the forming of a corporation, and for the reason that plaintiff was now an employee of the cab company, defendant thought it her duty to tell Brady what she had heard." There is absolutely nothing in the transcript before the Court to support the above-quoted paragraph. In fact the

transcript at pages 47, 48, 61 and 62 completely refute the purported statement of fact made by appellant. In any case the jury was instructed on privilege.

ARGUMENT.

POINTS I AND III.

Appellant's contention is that the statement "your wife is an ex-whore from Butte, Montana", is not slander per se and therefore, under the common law rule, plaintiff should have pleaded and proved special damages before a recovery could be allowed.

Appellant quotes from American Jurisprudence, Corpus Juris Secundum, Newell on Slander and Libel in support of her contention and cites likewise in support, the case of *Pollard v. Lyon,* 91 U.S. 225.

It would appear that the case of *Pollard v. Lyon* is more in support of the trial court's instructions than in support of appellant's contention, for there the court laid down the rule that words falsely spoken of another may be actionable per se when they impute to the party a criminal offense for which the party may be indicted and punished even though the offense is not technically denominated infamous if the charge involves moral turpitude and is such as will affect injuriously the social standing of the party. But in that case the words at most imputed unchastity.

In this case, the plaintiff was charged with having been a prostitute which is a criminal offense in Alaska and the trial court can be assumed to have taken

judicial notice of this in giving the questioned instruction. The charge is certainly one involving moral turpitude and of such a nature as to injuriously affect the social standing of the plaintiff not to mention her marital happiness.

In support of his contention, appellant cites the Oregon case of *Neelands v. Dugan,* 196 Pac. 1116, which case merely holds that it is controlled by a previous Oregon case entitled *Barnett v. Phelps,* 191 Pac. 502, (1920). It is of interest to note that the *Barnett* case recognized and vigorously criticized the common law rule, indicated that it was in accord with the holding and reasoning of the United States Supreme Court in the case of *Pollard v. Lyon* (supra), but decided that it was controlled by a still earlier Oregon case, *Davis v. Sladden,* 21 Pac. 140. The court stated that if relief from the harsh common law rule was to be obtained in Oregon, it would necessarily have to come from the legislature.

The *Barnett* case examined the early English common law and found that to be a common prostitute was not indictable as a distinct and substantive offense and to characterize a woman as such was not actionable per se except in London town where a whore was "carted". On page 666, the court pointed out that the law in this respect had been changed in England in 1891 and likewise in America in some states by statute and in others by the courts, ". . . declaring the old rule to be a reproach upon the law. . . ."

Completely at variance with the common law rule is the case of *Biggerstaff v. Zimmerman,* S/D Colo.

1941, 114 Pac. (2d) 1098. Colorado law provided that the common law of England should be the rule of decision and to be considered as of full force until repealed by legislative authority. The question before the court was whether or not moral charges of unchastity against a woman would support an action for slander without allegations of special damage. In its opinion, the court cited a previous Colorado case in which the applicability of the common law in Colorado was considered and on page 1099 said

> "Mr. Chief Justice Butler cites the well known legal maxim that, 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.' As to the proposition under discussion, non-liability under the common law was predicated upon the jurisdiction of ecclesiastical courts of such offenses. No such courts ever existed in this jurisdiction, and they are foreign to our fundamental law; therefore, there is no reason to suppose that the common law rule for which counsel for defendant contend ever was applicable in this state. Moreover, our democratic mode of life is not comparable with the conditions of social life in existence prior to the fourth year of the resign of James I of England. Unlike that period, American tradition and civilization, as we know it, has a far greater appreciation of the potential worth and dignity of the individual human being, and the right to be protected therein. English judges many years ago denounced the common law rule here involved as barbarous, with the result that Parliament in 1891 repealed the same."

The court further cited the case of *Battles v. Tyson,* Neb., 110 NW 299, as a case refusing to follow the common law rule and the American Law Institute, Restatement of the Law of Torts, Volume 3, sections 670 and 674 (apparently in error and meaning sections 570 and 574) as adopting the rule supporting the liability of one who publishes a slander imputing unchastity to a woman. It is interesting to note that the question of whether or not the slanderous words alleged to have been spoken in this case actually constituted a crime under the laws of Colorado was not before the court. The judgment sustaining the demurrer was reversed.

Although in Colorado the common law of England was to be the rule of decision *until repealed by legislative authority,* the court held it to be archaic and inapplicable under the circmstances. The wording of Sec. 2-1-2 Compiled Laws of Alaska 1949 provides only that

> "So much of the common law *as is applicable* and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska is adopted and declared to be the law in the Territory of Alaska." (Emphasis supplied.)

See:

Jansen v. Pollastrine (1942), 10 Alaska 316, 322;

McFarland v. Alaska Perseverance M. Co. (1907), 3 Alaska 308, 329, affirmed 164 Fed. 657.

American Law Institute Restatement of the Law of Torts, Volume 3, Section 571, page 171 reads as follows:

> "One who falsely and without a privilege to do so, publishes a slander which imputes to another conduct constituting a criminal offense is liable to the other *if the offense charged is of a type which, if committed in the place of publication would be*
>
> (a) *chargeable by indictment or its modern equivalent,* and
>
> (b) punishable by death or by imprisonment, otherwise than in lieu of fine." (Emphasis supplied.)

In comment (b) under this section it is pointed out that the matter of the statute of limitations was immaterial.

Section 574 at page 183 reads as follows:

> "One who falsely and without a privilege to do so, publishes a slander which imputes to a woman unchastity is liable to her."

In the comments contained in this volume with respect to each of the above-cited sections under "Damages", the slander is actionable per se irrespective of any special harm resulting and if the person spoken of actually sustained special harm, recovery may be had for that harm in addition to the damages otherwise recoverable.

POINT II.

Appellant contends that since the words spoken were not slander per se under the common law rule, special damages must have been alleged and proved and that the court's instruction No. 6 (TR 7) was error; that the trial court committed error in refusing to give defendant's proposed instructions 1-3 inclusive (TR 5-6).

This court must necessarily find that the common law rule applies in Alaska before this point would become pertinent, it would seem.

Even if such a finding is made it is submitted that defendant's proposed instruction No. 3 is not as adequate as the court's instruction No. 6 to guide the jury in determining whether or not special damages had been proved. Special damages were not alleged under the strict rules of pleading in effect in Alaska prior to the adoption of the Federal Rules of Civil Procedure. However, the complaint does set out separate items of damage, such as injury to plaintiff's name and character; her health and the frequent marital disturbances, and would appear to be sufficient under the provisions of Rule 9 (G) F.R.C.P., *without objection.* Defendant was apprised in the complaint of every item of damage intended to be presented at the trial and the court, in its instruction No. 6, properly directed the jury's attention to each item.

Appellant further contends that the injuries suffered by plaintiff were too remote to be the proximate cause of the spoken words.

The defendant must have been well aware of the habits of Charles Brady, her former son-in-law, and must or should have known the effect her words would have upon his conduct.

Newell, Slander and Libel (4th Ed.) Sec. 796 at page 904 clearly states that the act of a third party, if directly caused by defendant's language, is not too remote (to be the proximate cause) provided the defendant either did contemplate or ought to have contemplated such a result.

Here, in addition to knowing Brady's habits and character, defendant knew or must have realized the consequences of speaking such words to a husband and about his wife.

Appellant contends that all of plaintiff's injuries resulted from her husband's brooding and drinking which is not the case. See TR 54 where, under cross-examination by appellant's attorney, Charles Brady testified as follows:

> "Q. Well, all right. Now, Mr. Brady, you state that you were the only one that abused her about this statement and you only did it when you were drunk?
>
> A. Well, it wasn't necessarily all the time when I was drunk. If there was an argument that came up it came up usually.
>
> Q. When you weren't drinking?
>
> A. If I was drinking or not.
>
> Q. But didn't you previously state that it was mostly when you were drinking?
>
> A. Usually when I was drinking."

Certainly it can be assumed that the false statement, "You are not so smart, you have got an ex-whore for a wife", directed at her former son-in-law and present business partner, in anger, were intended to bring him down a notch or two in his own estimation and incidentally create extreme unpleasantness in his home and for the plaintiff whom defendant did not like (TR 34-35, 48-49). And this is exactly what happened.

POINT VII.

Appellant contends that the trial court committed reversible error in dividing the jury panel and sending one-half to another court in Anchorage where a jury trial was scheduled for the same date, citing Secs. 55-7-31, ACLA '49 and 59-7-41, ACLA '49.

Appellant made no objection to the action of the trial judge in dividing the panel of jurors reporting for duty on November 24, 1951 and sending one-half those reporting to another court for a scheduled jury trial. This amounts to a waiver of error in the proceedings, if such there was.

However, in reading the two sections of the Compiled Laws of Alaska relied upon by appellant, it would appear that the court was perfectly at liberty to divide the jurors present in order to permit the simultaneous trial of two civil cases at least as long as the panel remaining consisted of twenty-four available for jury duty, and it can be assumed that such was the case (Supp. Tr. p. 101).

These provisions of Alaska law were considered by this court in *Hauptman et al v. United States,* CCA 9th (1930) 43 Fed. (2d) 86. The court held (p. 90) that while the Territorial Legislature has the power to regulate the method of selection of grand and petit juries, it has no power to regulate the jurisdiction and authority of federal courts hearing appeals from the Territory of Alaska (meaning that portion of Sec. 55-7-31 ACLA '49 reading ". . . and any violation of the provisions of this Act is hereby declared to be reversible error."), and that defendant even in a criminal action cannot take advantage of slight departures from the procedure without showing that his rights have been prejudiced thereby. And on page 88 holding that the burden is on defendant to show by specific facts that he has been prejudiced, specifying how, in what manner, and to what extent.

Appellant fails to point out wherein the rights of the defendant were prejudiced in any manner by the action of the trial court. A legal and actual sufficiency of jurors remained from which to select. Appellant does not even allege that she was forced to exhaust all her peremptory challenges.

In *Alexander v. U. S.,* 138 U.S. 353, two copies of a list of thirty-seven jurymen available for the trial were made available to counsel for the government and defense, the court directing counsel for each side to proceed with its challenges independent of the other side. Counsel for defendant challenged two jurors that had also been challenged by the government. No ob-

jection was made by counsel for defendant. The Supreme Court held that it was the duty of counsel, in a criminal case, to seasonably call the attention of the court to any error in empaneling the jury, in admitting testimony or in any other proceeding during the trial by which the rights of the accused may be prejudiced and failing to do this, cannot rely upon the action of the trial court as error.

In *Beals v. Cone,* S/C Colo. (1900), 62 Pac. 948, the court held that since it was the custom of the El Paso District Court to divide its panel of jurors between its civil and criminal divisions, it was within the discretion of the court in the trial of a civil case to issue a new venire on the exhaustion of the jurors assigned to the civil division instead of drawing jurors from those assigned to the criminal division, *and the exercise of such discretion will not be reviewed on appeal.*

In *Blankenship v. State,* Cr. Ct. App. Okla. (1914), 139 Pac. 840, the court held that the defendant in a criminal action acquired no vested right to have a particular member of the jury panel sit upon the trial of his case until he has been accepted and sworn (and) unless an objectionable juror was forced upon the defendant after he had exhausted his peremptory challenges, he has no ground of complaint. This was a prohibition case. The statute provided that not to exceed twenty-four jurors should be drawn from the box for the panel. In this instance the court ordered the drawing of eighteen names and these persons were summoned—only sixteeen reporting. At the time of

trial, the original panel had dwindled to seven jurors reporting and from these seven jurors, a jury of six persons was selected to try this case.

In *Thomas v. State,* Cr. Ct. App. Okla. (1926) 244 Pac. 816, the court held that although the sheriff, a material witness, was permitted to replenish the jury panel by summoning five jurors on an open venire, after the regular panel had been exhausted and without objection from defendant that the right to challege the poll or the array is a right that may be waived, and in this case was waived.

Since appellant made no objection at the time the panel was divided and there were twenty-four jurors present from which to select; since appellant has failed to mention one respect in which the rights of his client were prejudiced or even that she was forced to exhaust all her peremptory challenges it is submitted that no error was committed.

CONCLUSION.

It is clear that in England, prior to 1891, prostitution was not a crime except in London. To refer to a lady as a whore or prostitute, except in London, amounted only to imputing unchastity in continued acts of fornication or adultery for gain. Falsely imputing unchastity was not actionable per se as it did not impute a criminal act.

Pollard v. Lyon in 1875 held that to falsely impute a crime was actionable per se but that merely imputing unchastity was not. As late as 1920 Oregon, in

Barnett v. Phelps, severely criticized the common law rule but followed an early Oregon case as controlling.

The Restatement of the Law of Torts makes it slander per se to impute a criminal offense of a type which, if committed in the place of publication, would be chargeable by indictment or its modern equivalent. Likewise to falsely impute unchastity to a woman.

Many states have followed the modern reasoning of *Biggerstaff v. Zimmerman* and held the common law rule inapplicable by court decision. Other states have accomplished this by statute.

In Alaska by statute the common law of England is to be considered only when applicable. The trial court did not consider it applicable in framing its instructions in this case and rightly so it is respectfully submitted. There seems to be no basis in reason for considering Alaskan courts bound by a rule of law developed in England over 150 years ago, when individual rights were lightly regarded and only ecclesiastical courts had the power to deal with prostitution. The rule of law was repudiated by England itself before Alaska was barely populated by white men.

Dated, Anchorage, Alaska,
March 12, 1956.

Respectfully submitted,
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